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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,
Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF RESPONDENTS DUKE ENERGY CORPORATION, ET AL.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. A TWO-STEP NSR APPLICABILITY TEST IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CAA	12
II. A TWO-STEP NSR APPLICABILITY TEST IS THE ONLY REASONABLE AND WORKABLE APPROACH TO IMPLEMENTING THE NSR PROGRAM.	15
A. NSR Review And Permitting Is Burdensome, Time-Consuming, And Expensive	15
B. If Petitioner's And EPA's Theory Of NSR Applicability Were To Prevail, Manufacturers Would Be Subject To Frequent And Repeated NSR Review And Permitting	17

TABLE OF CONTENTS—Continued

Page

C. Because Construction Of A Project That Triggers NSR Review Cannot Begin Until An NSR Permit Has Been Issued, Manufacturers Would Have To Operate Broken Equipment, If At All, In Its Impaired Condition While Waiting For A Permit To Be Issued 18

D. A Two-Step NSR Applicability Test Is Necessary For Satisfactory Economic And Administrative Results 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) ..... *passim*

Alaska Dep't of Envtl. Conservation v. *EPA*, 540 U.S. 461 (2004) 16

ASARCO Inc. v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978) 6, 14

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 4, 7, 9, 14

In re Tennessee Valley Authority, 9 E.A.D. 357 (2000) 22

New York v. *EPA*, 443 F.3d 880 (D.C. Cir. 2006) 19

NRDC v. *Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev'd on other grounds sub nom., Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) 14

United States v. *Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003) 19

Wisconsin Elec. Power Co. v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) 21

TABLE OF AUTHORITIES—Continued

	Page
STATUTES:	
42 U.S.C. § 7411	5
42 U.S.C. § 7411(a)(2)	5
42 U.S.C. § 7411(a)(3)	6
42 U.S.C. § 7411(a)(4)	5
42 U.S.C. §§ 7470 *et seq.*	6
42 U.S.C. § 7471	6
42 U.S.C. § 7475	7, 15
42 U.S.C. § 7475(a)(3)	16
42 U.S.C. § 7475(a)(4)	16
42 U.S.C. § 7475(a)(6)	16
42 U.S.C. § 7475(b)	16
42 U.S.C. § 7475(d)(2)(b)	16
42 U.S.C. § 7479(1)	6
42 U.S.C. § 7479(2)(C)	7
42 U.S.C. § 7479(3)	7, 16
42 U.S.C. §§ 7501 *et seq.*	7
42 U.S.C. § 7501(2)	6

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 7501(3)	7, 16
42 U.S.C. § 7501(4)	7
42 U.S.C. § 7502(c)(5)	6
42 U.S.C. § 7503	7, 15
42 U.S.C. § 7503(a)(1)	16
42 U.S.C. § 7503(a)(2)	7, 16
42 U.S.C. § 7503(c)	7, 16
42 U.S.C § 7602(j)	6, 14
RULES:	
S. Ct. R. 37.3(a)	2
S. Ct. R. 37.6	2
REGULATORY MATERIALS:	
40 C.F.R. Part 124	16
40 C.F.R. § 51.166(a)(7)(iii)	18
40 C.F.R. § 51.166(b)(2)(i) (1987)	9
40 C.F.R. § 51.166(b)(2)(iii)(a) (1987)	19
40 C.F.R. § 51.166(b)(2)(iii)(f) (1987)	9, 12

TABLE OF AUTHORITIES—Continued

	Page
40 C.F.R. § 51.166(b)(3)(i)-(viii) (1987)	9
40 C.F.R. § 51.166(b)(23)	12
40 C.F.R. § 51.166(b)(23)(i)	14
40 C.F.R. § 51.166(b)(23)(i) (1987)	9
40 C.F.R. § 51.166(q)	16
40 C.F.R. § 60.14(a)	5
40 C.F.R. § 60.14(b)	5
40 C.F.R. § 60.14(e)(3)	5
40 C.F.R. § 60.40	5
39 Fed. Reg. 36,946 (Oct. 15, 1974)	5, 12
40 Fed. Reg. 58,416 (Dec. 16, 1975)	5, 6
43 Fed. Reg. 26,380 (June 19, 1978)	7
45 Fed. Reg. 52,676 (Aug. 7, 1980)	9, 10
46 Fed. Reg. 50,766 (Oct. 14, 1981)	9, 10
57 Fed. Reg. 32,314 (July 21, 1992)	21
65 Fed. Reg. 77,623 (Dec. 12, 2000)	18
65 Fed. Reg. 79,825 (Dec. 20, 2000)	19
67 Fed. Reg. 80,186 (Dec. 31, 2003)	21

TABLE OF AUTHORITIES—Continued

Page

70 Fed. Reg. 61,081 (Oct. 20, 2005) 21

OTHER AUTHORITIES:

EPA, *New Source Review: Report to the President* (2002) 16

Federal Land Managers' Air Quality Related Values Workgroup Phase I Report (Dec. 2000)..... 16

Interior, Environment, and Related Agencies Appropriations for 2007 Part 7: Hearing Before the Subcomm. on Interior, Environment and Related Agencies of the H. Comm. on Appropriations, 109th Cong. 591 (2006) (Testimony of Members of Congress, Prepared Statements of Outside Witnesses) 20

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the National Environmental Development Association's Clean Air Project ("NEDA/CAP") is a coalition of manufacturers representing major industrial sectors, including the aerospace, aluminum, automobile manufacturing, natural resource exploration, refining and petrochemicals, pharmaceuticals, electronics, and home products

industries.[1] NEDA/CAP was formed in 1979, shortly after the enactment of the 1977 Clean Air Act Amendments, to address major policy issues arising under the Clean Air Act ("CAA"), its regulations, and Environmental Protection Agency ("EPA") guidance. NEDA/CAP's members own and operate "major emitting facilities" and "major stationary sources" under the CAA, and thus are subject to the extensive review and permitting requirements of the CAA's New Source Review ("NSR") program when they make changes at their plants that trigger NSR review.

Although this case involves an electric utility, the issue in this case—whether a "modification" for NSR purposes requires an increase in maximum achievable hourly emissions—affects a broad spectrum of manufacturing industries, both large and small. In contrast to electric utilities that use a single configuration of equipment to generate electricity, manufacturers typically use multiple process lines—consisting of dozens or even hundreds of pieces of equipment with numerous emissions points—to manufacture various products during different periods of the year depending on economic demand and other factors. While electric utilities often make large-scale repairs to very large pieces of equipment—*i.e.*, coal-fired boilers—to keep them operating as designed, manufacturers often make smaller changes to smaller pieces of equipment in response to breakdowns and other disturbances. If petitioners' and EPA's interpretation of the CAA were upheld, such activities would be repeatedly subject to NSR review. The recent invalidation of an EPA regulation concerning an exclusion for "routine, mainte-

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[1] Pursuant to this Court's Rule 37.6, NEDA/CAP notes that no part of this brief was authored by counsel for any party, and no person or entity other than NEDA/CAP made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.

nance, repair, and replacement" elevates the importance of the definition of emissions "increase" at issue here. *See New York* v. *EPA*, 443 F.3d 880 (D.C. Cir. 2006).

More than 35 years ago, EPA interpreted the statutory definition of "modification" for the first time in the context of the New Source Performance Standards ("NSPS") program and interpreted it to mean an increase in maximum achievable hourly emissions. Several years later, EPA defined "major modification" in the NSR context as a significant net increase in actual annual emissions. Congress specifically provided that the term "modification" in the NSR context have the same meaning as the term "modification" in the NSPS context. Thus, NSR review should be triggered only if a change results in a "modification"—requiring an increase in a unit's maximum achievable hourly emissions—and a "major modification"—requiring a significant net increase in source-wide actual annual emissions.

This two-step NSR applicability test ensures that NSR applies only to those projects that merit both the extensive permit application and review process and the installation of costly emission controls. An increase in maximum achievable hourly emissions typically does not occur unless a manufacturer makes a change that *increases* production capacity. A change that increases production capacity—and thus increases maximum achievable hourly emissions—warrants the application of new emissions controls. Not all increases in hourly emissions are significant enough, however, to warrant NSR review and permitting and the installation of state-of-the-art emissions controls. Many increases in maximum achievable hourly emissions at an individual unit will not cause a significant net increase in source-wide actual annual emissions because, for example, demand or production may decrease over the course of a year or because an emissions increase at an individual unit may be offset by an emissions decrease at another unit within a plant. If a project will not only increase maximum achievable hourly emissions

(a "modification") but also cause a significant net increase in actual annual emissions (a "major modification"), then the project may have a significant environmental impact—one that more reasonably justifies NSR review and the installation of more costly emissions controls. Thus, a two-step NSR applicability test closely aligns with one of the central goals of the NSR program—balancing the interest in improving air quality with "the allowance of reasonable economic growth." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 863 (1984).

Petitioners and EPA would have this Court hold that a "modification" is not required to trigger NSR review—*i.e.*, that the Court eliminate the first step of the NSR applicability test. Petitioners' and EPA's interpretation of the CAA—which subjects a source to NSR review even where a change does not increase production capacity—would require sources to undergo NSR review far more frequently than Congress could have ever intended. This Court should affirm the judgment below and hold that "modification" in the NSR context means the same thing as it does in the NSPS context—*i.e.*, a change that increases maximum achievable hourly emissions. At the same time, the Court should make clear that EPA's definition of "major modification"—requiring a significant net increase in source-wide actual annual emissions before NSR review is triggered—is consistent with the CAA. As we explain below, there are key differences between the NSPS and NSR programs—highlighted in a line of significant decisions—that warrant the requirement of a "major modification" as a second step of the NSR applicability test.

STATEMENT OF THE CASE

The NSPS Program. In 1970, Congress enacted the NSPS program, which directed EPA to prescribe national technology-based performance standards for various categories of equipment—*e.g.*, fossil fuel-fired steam generators. *See* 42

U.S.C. § 7411; 40 C.F.R. § 60.40. The NSPS program applies only to "new sources"—*i.e.*, any "stationary source," the "construction" or "modification" of which is commenced after the publication of regulations prescribing a performance standard applicable to such source. 42 U.S.C. § 7411(a)(2). "Modification" is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

In 1975, EPA promulgated regulations that for the first time "clarif[ied] the phrase * * * 'increases the amount of any air pollutant,' " in the statutory definition of "modification." 39 Fed. Reg. 36,946, 36,946 (Oct. 15, 1974). The 1975 rules provided that, with certain exceptions, "any physical or operational change to an existing facility which results in an increase *in the emission rate to the atmosphere* of any pollutant to which a standard applies shall be a modification." 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) (40 C.F.R. § 60.14(a), (e)(3)) (emphasis added). To further "clarif[y] what constitutes an increase in emissions," 39 Fed. Reg. at 36,947, the 1975 rules provided that the "[e]mission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere." 40 Fed. Reg. at 58,419 (40 C.F.R. § 60.14(b)). As EPA explained, the unit "kg/hr" has "the advantages of being sensitive to increased production capacity and to the overall increase in total emissions to the atmosphere," while "*automatically* allow[ing] increases in operating hours as intended by one of the existing exemptions." 39 Fed. Reg. at 36,947 (emphasis added).

The 1975 rules also provided that "[a] modification shall not be deemed to occur if an existing facility undergoes a physical or operational change where * * * the total emission rate of any pollutant has not increased from all facilities within the stationary source." 40 Fed. Reg. at 58,419. That application of the "bubble concept"—which treats an entire

plant as a single "source" and allows emissions increases from units within the plant to be offset by emissions decreases from other units within the plant—was invalidated by the D.C. Circuit in *ASARCO Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978). The NSPS provisions define "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). In the 1975 rules, however, EPA defined "stationary source" to include a "combination" of facilities. *See* 40 Fed. Reg. at 58,418. By so defining "stationary source," the rules "allow[ed] a facility whose emissions are increased by alterations to avoid complying with the applicable NSPS as long as emissions decreases from other facilities within the same 'source' cancel out the increase from the altered facility." 578 F.2d at 326. The D.C. Circuit concluded, however, that EPA "ha[d] no authority to rewrite the statute in this fashion." *Id.* at 327.

The NSR Program. In 1977, Congress enacted the New Source Review ("NSR") program. The NSR program has two components: the Prevention of Significant Deterioration ("PSD") program, *see* 42 U.S.C §§ 7470 *et seq.*, and the Nonattainment New Source Review ("NNSR") program, *see id.* §§ 7501 *et seq.* The PSD program applies in "attainment areas"—*i.e.*, those areas meeting the NAAQS for particular pollutants, *id.* § 7471; the NNSR program applies in "nonattainment areas"—*i.e.*, those areas that have not yet met the NAAQS for particular pollutants, *id.* § 7501(2). The PSD program applies to any new or modified "major emitting facility," *id.* § 7479(1); the NNSR program applies to all new or modified "major stationary sources," *id.* § 7502(c)(5). "Major stationary source" and "major emitting facility" are defined as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year of any air pollutant." *Id.* § 7602(j).[2] The

[2] The term "major emitting facility" is separately defined in the Act to include a number of specifically identified "stationary

NNSR provisions define "modification" to "mean the same as the term 'modification' *as used* in section 7411(a)(4)"—*i.e.*, the NSPS definition of "modification." *Id.* § 7501(4) (emphasis added). The PSD provisions define "construction" to "include[] * * * modification * * * (*as defined* in section 7411(a)." *Id.* § 7479(2)(C) (emphasis added).

Both the PSD and NNSR programs require affected sources to undergo an extensive preconstruction review process and to obtain a preconstruction permit, which may not be issued "unless several stringent conditions are met." *Chevron*, 467 U.S. at 840. *See* 42 U.S.C. §§ 7475, 7503; *infra* at 15-16. The PSD program requires affected sources to apply emissions controls determined to be the "best available control technology" ("BACT"). 42 U.S.C. §§ 7475(a)(4), 7479(3). The NNSR program requires affected sources to apply emissions controls determined to achieve the "lowest achievable emissions rate ("LAER"). *Id.* § 7501(3), 7503(a)(2). The NNSR program also requires that *any* emissions increase at a source be offset by a corresponding decrease at the same source or another source in the same non-attainment area. *See id.* § 7503(c).

In 1978, EPA promulgated rules implementing the PSD program. The 1978 rules defined "*major* modification" as "any physical change [or] change in the method of operation of * * * a stationary source which increases the *potential emission rate* of any air pollutant regulated under the Act * * * by either 100 tons per year or more for [certain] source[s] * * * or by 250 tons per year or more for any stationary source." 43 Fed. Reg. 26,380, 26,382 (June 19, 1978) (emphases added). In *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit held that, while there was no statutory basis for EPA's 100- and 250-ton thresholds for PSD applicability, "EPA *does* have discre-

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sources of air pollutants," such as "kraft pulp mills" and "iron and steel mill plants." 42 U.S.C. § 7479(1).

tion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." *Id.* at 400 (emphasis added). As the court recognized, "the application of BACT requirements to the emission of all pollutants from a new facility, *no matter how miniscule some may be*, could *impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities*." *Id.* at 405 (emphases added).

The *Alabama Power* court also endorsed the application of the "bubble concept" in the PSD context. As the court recognized, "alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demand." *Id.* at 401. Congress, however, intended to subject sources to PSD review "only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id.* Thus, the court concluded, an "interpretation of 'modification' as requiring a *net* increase is * * * consistent with the purposes of the Act." *Id.* (emphasis added).

In so holding, the court distinguished its decision in *ASARCO*, relying on differences in statutory language in the NSPS and PSD provisions. In the NSPS context, the court explained, EPA had no authority to expand the definition of "source" to include an entire plant where "[t]hat definition * * * was not expanded by any other part of the NSPS provisions." *Id.* at 397. "With regard to PSD, however, Congress clearly envisioned that entire plants could be considered to be single 'sources.' " *Id.* As the court explained, the CAA expressly defines "major emitting facility" to include "many types of plants as stationary sources." *Id.* at 396. Thus, the court concluded, "EPA has latitude to adopt definitions of the component terms of 'source' that are different *in scope* from those that may be employed for

NSPS * * *, due to differences in the purpose and structure of the two programs." *Id.* at 397-398 (emphasis added).

In 1980, EPA issued new PSD regulations in response to *Alabama Power*. *See* 45 Fed. Reg. 52,676 (Aug. 7, 1980). The 1980 rules defined "major modification" as "any physical change in or change in the method of operation of a stationary source that would result in a *significant net* emissions increase of any pollutant subject to regulation under the Act." *Id.* at 52,730 (40 C.F.R. § 51.166(b)(2)(i) (1987)) (emphasis added). The rules also specified that "[a] physical change *or* change in the method of operation shall not include * * * [a]n increase in the hours of operation." *Id.* at 52,736 (40 C.F.R. § 51.166(b)(2)(iii)(f) (1987)) (emphasis added). The 1980 rules set "significance levels" for pollutants by defining "significant" as "a rate of emissions that would equal or exceed" specified amounts of emissions (in tpy) for given pollutants, *id.* at 52,732 (40 C.F.R. § 51.166(b)(23)(i) (1987)), and also established methods of determining source-wide "net" increases (netting rules). *Id.* at 52,730 (§ 51.166(b)(3)(i)-(viii) (1987)).

In 1981, EPA promulgated regulations applying the "bubble concept" in the NNSR context. *See* 46 Fed. Reg. 50,766 (Oct. 14, 1981). In *Chevron*, *supra*, this Court held that EPA's definition of the term "source"—which defined the component terms of the NSPS statutory definition of "source" to include "all of the pollution-emitting devices within the same industrial grouping"—was "a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth." *Id.* at 840, 865. As the Court noted, the legislative history of the CAA "plainly identifies the policy concerns that motivated the enactment [of the NSR program]," and "the plant-wide definition is fully consistent with one of these concerns—*the allowance of reasonable economic growth.*" *Id.* at 863 (emphasis added).

SUMMARY OF ARGUMENT

I. A two-step NSR applicability test—requiring both a "modification" and a "major modification" to trigger NSR review—is consistent with the plain language of the CAA. Because Congress specifically incorporated the NSPS definition of "modification" into the NSR definition of "modification," an NSPS "modification" is required in the first instance to trigger NSR review. EPA's definition of "major modification"—requiring in addition a significant net increase in source-wide actual annual emissions before NSR review is triggered—reflects two key differences between the NSPS and NSR programs. First, the "bubble concept"—which allows plantwide emissions increases to be offset by contemporaneous emissions decreases—applies in the NSR context, but not the NSPS context. Second, the NSR program contains exemptions for *de minimis* increases, without which the NSR program would "impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities." *Alabama Power*, 636 F.2d. at 405. These two salient features of the definition of "major modification" have been upheld by the courts and "explain why emissions under [NSR] must be calculated on an annual basis" as a second step in determining NSR applicability. Pet. App. 64.

II. A two-step NSR applicability test is also the only reasonable and workable approach to implementing the NSR program. There is no question that NSR review and permitting is burdensome, time-consuming, and expensive. Manufacturers often make repairs and other changes that do not increase production capacity—and thus do not increase maximum achievable hourly emissions—to maintain production capacity, respond to market demand, and ensure the reliability, efficiency, and safety of their equipment. If petitioner's and EPA's theory of NSR applicability were to prevail, repairs and other changes that do not increase production capacity could potentially trigger NSR review, as

EPA measures increases by comparing past historical emissions—*i.e.*, emissions before a repair when the equipment was operating in an impaired condition—to future actual emissions—*i.e.*, emissions after the repair when the equipment may be fully functional and operating as designed.

Frequent—and for the same piece of equipment, repeated—NSR review would have a crippling effect on manufacturers, permitting authorities, and the economy. Because construction of a project that triggers NSR review may not begin until a permit has been issued, manufacturers would have to operate broken equipment in its impaired condition—or worse, not at all—during the lengthy NSR review and permitting process and until construction is completed. If NSR review were required for changes that do not increase production capacity, manufacturing would come to a standstill, critical (and life-saving) products would not reach consumers, and financially-strapped permitting authorities would be overwhelmed.

The first step of the NSR applicability test—requiring an increase in a unit's maximum achievable hourly emissions—is therefore a critical step for manufacturers. But equally vital is the second step of the NSR applicability test—requiring a significant net increase in source-wide actual annual emissions. Not all changes that increase production capacity—and that warrant the application of NSPS emissions controls—have a significant enough impact on ambient air quality to warrant NSR review and the application of costly state-of-the-art emissions controls. As noted in *Alabama Power*, the two salient features of the annual emissions test—significance levels and netting—ensure that the NSR program does not "*impos[e] a completely disabling administrative and regulatory burden.*" 636 F.2d at 400 (emphasis added). A two-step applicability test—requiring NSPS controls for changes that increase production capacity and NSR controls for those changes that also have a significant impact on ambient air quality—is therefore not only

consistent with the CAA, but also the only approach that yields satisfactory economic and administrative results.

ARGUMENT

I. A TWO-STEP NSR APPLICABILITY TEST IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CAA.

More than 35 years ago, EPA "clarif[ied]" for the first time the term "increase" in the statutory definition of "modification." 39 Fed. Reg. at 36,946. At that time, EPA recognized that many potential "unit[s] of measurement" could be used to "determin[e] whether an increase in emissions has occurred"—*e.g.*, "units of time (day, year), concentration, feed rate into a process, and production rate." *Id.* at 36,947. EPA concluded, however, that "[u]nits of time" have "the advantages of being sensitive to increased production capacity and to the overall increase in total emissions to the atmosphere." *Id.* EPA decided that the most appropriate "unit of time" for "determining whether an increase in emissions has occurred" was the unit "kg/hr," which would "*automatically* allow increases in operating hours as intended by one of the existing exemptions." *Id.* (emphasis added).

There is no reason why an "increase" in emissions should be defined as an increase in a unit's maximum achievable hourly emissions rate for NSPS purposes but not for NSR purposes, particularly where the NSR regulations include the *same* exclusion for "increases in operating hours." *See* 40 C.F.R. § 51.166(b)(2)(iii)(f) (1987). But the application of the NSPS hourly emissions test in the NSR context does not—and should not—preclude the further application of a source-wide annual emissions test. Indeed, EPA *itself* has opined that there must be both an NSPS "modification" and an NSR "major modification" to trigger NSR review. As EPA confirmed shortly after it adopted the 1980 rules, as a threshold matter, "PSD applicability is determined by evaluating any change in the [hourly] emissions rates caused

by" a proposed physical or operational change. *See* J.A. 27-28. Thus, the District Court below concluded that PSD review is triggered *only* if there is 1) an increase in a unit's maximum achievable hourly emissions, and 2) a significant net increase in source-wide actual annual emissions. As the court explained:

> PSD may be triggered if there is an increase in the maximum hourly emissions rate. In this regard, the PSD and NSPS emissions tests are similar. Unlike NSPS which is always triggered whenever there is an increase in the hourly rate of emissions, PSD is potentially triggered when there is an increase in the hourly emissions rate but only if the annualized emissions increase (1) exceeds the significance levels in 40 C.F.R. § 51.166(b)(23) and (2) is not offset by contemporaneous decreases at the source, *id.* § 51.166(b)(3). [Pet. App. 64a.]

The same result should follow under the Fourth Circuit's approach, which focused solely on the fact that "Congress mandated that the PSD statute incorporate the NSPS statutory definition of 'modification.' " *Id.* at 18a. The Fourth Circuit held that "EPA cannot interpret 'modification' under the PSD *inconsistently* with the way it interprets that term under the NSPS." *Id.* at 11a (emphasis added). Because "NSPS regulations * * * define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification,' " the Fourth Circuit held that "EPA must * * * interpret its PSD regulations defining 'modification' congruently." *Id.* at 18a. There is nothing "inconsistent" about defining "modification" in both the NSPS and NSR contexts to mean an increase in a unit's maximum achievable hourly emissions and defining "major modification" in the NSR context to mean a significant net increase in source-wide actual annual emissions. Put differently, it is not inconsistent for EPA to use an hourly emissions test in the NSPS context and a two-step hourly and annual emissions test in the NSR context, where the use of

that second step is based on important differences between the two programs.

One significant difference between the NSPS and NSR programs involves the application of the "bubble concept," which allows plantwide emissions increases to be offset by contemporaneous emissions decreases. In *ASARCO*, the D.C. Circuit rejected the application of the bubble concept in the NSPS context. *See* 578 F.2d at 326-327; *supra* at 5-6. In *Alabama Power*, the D.C. Circuit—relying on differences in statutory language in the NSPS and NSR provisions—held that the application of the bubble concept in the PSD context was "mandatory." *NRDC* v. *Gorsuch*, 685 F.2d 718, 726 (D.C. Cir. 1982), *rev'd on other grounds sub nom. Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). *See supra* at 8-9. In *Chevron*, this Court held that EPA had reasonably exercised its discretion to employ the bubble concept in the NNSR context. *See* 467 U.S. at 865; *supra* at 9.

Another key difference between the NSPS and NSR programs involves the exemption of *de minimis* increases. In *Alabama Power*, the D.C. Circuit recognized that subjecting *all* increases to PSD review, "no matter how miniscule some may be," could "*impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities*." 636 F.2d. at 405 (emphasis added). Thus, the court held, "EPA *does* have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." *Id.* at 400 (emphasis added). Those exemptions are reflected in the "significance levels" that EPA has established for various pollutants. *See* 40 C.F.R. § 51.166(b)(23)(i); *supra* at 9.

As the District Court below explained, the "two conditions for PSD applicability—significance levels and netting"—"explain why emissions under PSD must be calculated on an annual basis." Pet. App. 64. "[M]easuring emissions in tons

per year makes possible netting (addition and subtraction) of emissions rates between various units at a plant." *Id.* An annual emissions test also "makes possible" the exemptions for *de minimis* increases, which must be measured in tons per year since "major" stationary sources are defined as sources that emit "one hundred *tons per year* or more of any air pollutant." 42 U.S.C. § 7602(j) (emphasis added).

EPA's definition of "major modification" in the NSR context reflects these differences between the NSPS and NSR programs. Thus, in the NSR context, EPA may require both a "modification" *and* a "major modification" to trigger NSR review. What EPA emphatically *cannot* do is require NSR review for a change that is not "modification."

II. A TWO-STEP NSR APPLICABILITY TEST IS THE ONLY REASONABLE AND WORKABLE APPROACH TO IMPLEMENTING THE NSR PROGRAM.

A two-step NSR applicability test is not only consistent with the plain language of the CAA, but the only reasonable and workable approach to implementing the NSR program. Without the two-step test, manufacturers would be subject to frequent—and for the same piece of equipment, repeated—NSR review and permitting. That outcome would have a crippling effect on industry, permitting authorities, and the economy.

A. NSR Review And Permitting Is Burdensome, Time-Consuming, And Expensive.

There is no question that the NSR program imposes substantial burdens on industry. If a proposed change triggers NSR review, an operator must comply with numerous "stringent" requirements. *Chevron*, 467 U.S. at 840. *See* 42 U.S.C. §§ 7475, 7503. Among other things, extensive computer modeling is required to determine the proposed project's impact on ambient air quality, PSD increments, and

NNSR growth margins. *See id.* §§ 7475(a)(3), (6), (b), 7503(a)(1). If a Class I national park or wilderness area in a PSD area may be affected, an analysis of the project's effect on visibility and environmentally sensitive biota, such as milkweed, clover, and poison ivy, is also required. *See id.* § 7475(d)(2)(b); Federal Land Managers' Air Quality Related Values Workgroup Phase I Report 84-102 (Dec. 2000). The technical feasibility and the costs of applying state-of-the-art emissions controls—*i.e.*, BACT or LAER—must also be evaluated. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3), 7501(3), 7503(a)(2). If NNSR review has been triggered, an emissions offset must be obtained at the same source or another source within the same non-attainment area. *See id.* § 7503(c).

NSR review is also very time-consuming. EPA recently reported that the entire NSR permitting process can take between 7 and 22 months. *See* EPA, *New Source Review: Report to the President* 20 (2002); *see also Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 515 (2004) (18-month PSD permitting process) (Kennedy, J., dissenting). In the experience of NEDA/CAP's members, the permitting process for a complex project can actually take much longer—sometimes between five and seven years. *See Alaska*, 540 U.S. at 516-517 (noting experience of NEDA/CAP's members) (Kennedy, J., dissenting). That is due in no small part to the substantial burden that NSR places on, not only industry, but permitting authorities. *See Alabama Power*, 636 F.2d at 400, 405 (recognizing administrative burden imposed by PSD). Permitting authorities must devote a substantial amount of time to reviewing and analyzing permit applications and supporting documentation. Once a permit application has been approved, it must be subjected to public notice and comment; agencies must respond to such comments and provide a hearing, if requested. *See* 40 C.F.R. Part 124; § 51.166(q).

And it cannot be disputed that NSR review is expensive. *See, e.g., Alabama Power*, 636 F.2d at 353 (noting the "*substantial regulatory costs* imposed by" the PSD program) (emphasis added). The costs of preparing a permit application alone can be substantial. Last year, one of NEDA/CAP's members spent $300,000—exclusive of legal costs—to prepare a permit application to make a change at an Ohio auto plant. In 2004, another NEDA/CAP member spent more than $1 million to prepare a permit application to install two paper machines and a gas-fired boiler at a Missouri paper and diaper plant. Neither of those applications was publicly-contested, which can occur and multiply exponentially the costs of obtaining a permit.

But the costs of preparing a permit application pale in comparison to the capital expenditures required to retrofit equipment with BACT or LAER, which can run into the millions of dollars. In 2002, a NEDA/CAP member was required to comply with BACT at an existing source by installing a $6 million carbon absorber to reduce VOC emissions. In 2001, another NEDA/CAP member would have had to spend between $75-$100 million to equip a 400 megawatt coal-fired industrial boiler with BACT to reduce SO2, NOx, and CO emissions. Because of the staggering cost of BACT, the project was abandoned.

B. If Petitioner's And EPA's Theory Of NSR Applicability Were To Prevail, Manufacturers Would Be Subject To Frequent And Repeated NSR Review And Permitting.

If the first step of the NSR applicability test were eliminated—*i.e.*, if changes that do not constitute a "modification" because they do not increase production capacity potentially triggered NSR review—manufacturers would be subject to frequent and repeated NSR review. Manufacturers often make changes that do not increase production capacity—and thus do not increase maximum achievable hourly emissions.

For example, manufacturers continually repair equipment due to breakdowns, wear and tear, and damage. Such repairs allow manufacturers to maintain production capacity, respond to market demand, and ensure the reliability, efficiency, and safety of their equipment. While such changes may allow increased hours of operation—because, for example, the equipment is fully functional and operating as designed—they generally do not increase maximum achievable hourly emissions. If the first step of the NSR applicability test were eliminated, such changes might trigger NSR review, as EPA measures increases by comparing past historical emissions to future actual emissions. *See infra* at 21.

Frequent and repeated NSR review for repairs and other changes that do not increase production capacity would have a crippling effect on industry, permitting authorities, and the economy. The costs of repeatedly complying with the NSR permitting process—not to mention the costs of re-applying BACT or LAER, if new technology emerges—would alone have a devastating impact on industry.

C. Because Construction Of A Project That Triggers NSR Review Cannot Begin Until An NSR Permit Has Been Issued, Manufacturers Would Have To Operate Broken Equipment, If At All, In Its Impaired Condition While Waiting For A Permit To Be Issued.

Even more devastating to industry would be the substantial delays resulting from frequent NSR review. If NSR review is triggered, construction of a project may not begin until a permit has been issued. *See* 40 C.F.R. § 51.166(a)(7)(iii). That means that if broken equipment is being replaced, a manufacturer must operate the equipment in its impaired condition—or worse, not at all—until a permit has been issued and construction completed. Given that dozens if not hundreds of such changes may occur on a single process line

over the course of a year, manufacturing would grind to a halt if NSR permitting were required for changes that do not increase production capacity.[3]

In that regard, not only industry but the entire economy would suffer. What is more, critical products—like life-saving medicines—would not reach consumers. Nor is frequent and repeated NSR permitting desirable from a regulatory perspective. As noted, the NSR program places substantial administrative burdens on EPA and state and local permitting authorities operating with limited resources.[4]

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[3] The 1980 rules exclude from the definition of "physical change or change in the method of operation" certain changes that are "routine maintenance, repair and replacement." *See* 40 C.F.R. § 51.166(b)(2)(iii)(a) (1987); *see also* 40 C.F.R. § 51.166(b)(2)(iii)(a). The scope of that exclusion—a disputed issue in this case below—is a matter of great uncertainty and complexity. EPA has published interpretative guidance that requires consideration of at least 14 criteria to determine whether a change is "routine maintenance, repair, and replacement." *See* 65 Fed. Reg. 77623 (Dec. 12, 2000). EPA has asserted that the exclusion is "very narrow," *United States* v. *Ohio Edison Co.*, 276 F. Supp. 2d 829, 888 (S.D. Ohio 2003), and the D.C. Circuit has suggested that it only applies to changes that cause *de minimis* emissions increases. *See New York* v. *EPA*, 443 F.3d at 890.

[4] Amici Curiae STAPPA & ALAPCO recently testified before Congress concerning proposed budgets cuts to grants to state and local permitting authorities, protesting such cuts "[i]n a time of limited state and local resources, where state and local governments *are straining to maintain existing programs.*" *Interior, Environment, and Related Agencies Appropriations for 2007 Part 7: Hearings Before the Subcomm. on Interior, Environment and Related Agencies of the House Comm. on Appropriations*, Testimony of Members of Congress, Prepared Statements of Outside Witnesses, 109th Cong. 591 (2006) (statement of State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials) (emphasis added).

If NSR permits are to be required for repairs and other changes that do not increase production capacity, permitting authorities will be quickly overwhelmed—thus leading to even longer delays in the permitting process—unless they receive substantial additional funding which likely would have to be diverted from other important governmental programs.

D. A Two-Step NSR Applicability Test Is Necessary For Satisfactory Economic And Administrative Results.

As the foregoing makes clear, the first step of the NSR applicability test—requiring an increase in a unit's maximum achievable hourly emissions—is a critical step for manufacturers. But equally vital is the second step of the NSR applicability test—requiring a significant net increase in source-wide actual annual emissions. While changes that increase production capacity—and thus increase a unit's maximum achievable hourly emissions—warrant the application of NSPS emissions controls, not all such changes have a significant enough impact on ambient air quality to warrant NSR review and the application of state-of-the-art emissions controls. Many increases in a unit's maximum achievable hourly emissions will not cause a significant net increase in source-wide actual annual emissions because, for example, the equipment may be operated for only a short time. Thus, only those changes that not only increase production capacity but also cause a significant net increase in source-wide actual annual emissions warrant NSR review and permitting.

As the D.C. Circuit explained in *Alabama Power*, an exemption for *de minimis* increases and netting—the two salient elements of "major modification"—"allow for improvement of plants, technological changes, and replacement of depreciated capital stock, *without imposing a completely disabling administrative and regulatory burden.*" 636 F.2d at 400 (emphasis added). A two-step applicability test—

requiring NSPS controls for changes that increase production capacity and NSR controls for increases in capacity that also have a significant impact on ambient air quality—is therefore not only consistent with the CAA, but also the only approach that yields satisfactory economic and administrative results.

That two-step test also provides industry with two things of which it is sorely in need: consistency and predictability. EPA's current test for calculating an emissions increase is by no means "longstanding." Pet. Br. i. EPA's departure from its contemporaneous conclusion that the 1980 rules required an increase in maximum achievable hourly emissions to trigger NSR review began with the applicability determination at issue in *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCo*"). *See* J.A. 27-28, 35-37. There, EPA applied an "actual-to-potential" test to a utility's like-kind replacement of aging equipment. 893 F.2d at 916. Since then, EPA has applied various methodologies for comparing emissions before and after a change. In response to the invalidation of the "actual-to-potential" test in *WEPCo*, EPA adopted an optional "actual-to-projected actual" test—but only for existing electric utilities. *See* 57 Fed. Reg. 32,314, 32,314 (July 21, 1992). In 2002, EPA adopted an optional "actual-to-projected actual" test for all existing sources. *See* 67 Fed. Reg. 80,186, 80,196 (Dec. 31, 2003). Presently pending is EPA's 2005 proposal of a new test that, if adopted, "would establish a uniform emissions test nationally under the NSPS and NSR programs"—but, again, only for existing electric utilities. *See* 70 Fed. Reg. 61,081, 61,081 (Oct. 20, 2005).

This case itself highlights EPA's inconsistency: after initially asserting that the applicable test was the "actual-to-potential" test, EPA later abandoned that approach in favor of an "actual-to-projected actual" test. *See* Pet. App. 58a & n.17. In a previous enforcement action against the Tennessee Valley Authority, EPA never even identified the emissions increase test that provided the basis for its enforcement

action, but instead asserted that an emissions increase resulted under any of "several different methods" of calculating an emissions increase. *See In re Tennessee Valley Authority*, 9 E.A.D. 357, 439-440 & n.97 (2000). In establishing the NSR program, Congress surely could not have envisioned such a confusing and haphazard regulatory scheme.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,
v.
DUKE ENERGY, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL PARKS CONSERVATION ASSOCIATION AND OUR CHILDREN'S EARTH FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. The Underlying Issue in the Case 3

B. The Fourth Circuit's Interpretation Cannot Be Supported by the Language of the Regulations ... 4

C. Allowing a Collateral Attack of an Environmental Regulation in the Context of an Enforcement Action Would Undermine the Enforcement Scheme of Many Environmental Statutes 11

D. The Outcome in this Case Could Have Broad Implications on the Air Quality in the Nation's National Parks 14

CONCLUSION 23

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Alabama Power Co. v. Costle,
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STATEMENT OF INTEREST[1]

The National Parks Conservation Association ("NPCA") is a nonprofit citizen organization whose purpose is to protect and enhance the natural and cultural resources of America's National Park System as well as forests, wilderness, and open space areas through research, public education, advocacy, and litigation. NPCA was founded in 1919 and today has over 450,000 members nationwide. NPCA, with its members, is active in protecting air quality in natural areas of interest.

As part of its activities, NPCA is a plaintiff in two Clean Air Act citizen suits against the Tennessee Valley Authority alleging the same type of violations at issue in this case. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (pending) and *National Parks Conservation v. TVA*, No. 06-10729-J (11th Cir.) (pending). NPCA contends that these alleged violations (from TVA plants located in Alabama and Tennessee) cause tens of thousands of tons of needless pollution annually and are having a significant adverse impact on protected federal lands, including Great Smoky Mountains National Park.

Our Children's Earth Foundation ("OCE"), a non-profit membership organization, is dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improving environmental quality for the public benefit. OCE has members in Tennessee, and to protect the interests of its members, particularly from the impact of TVA's alleged excessive emissions of sulfur dioxide

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than amici curiae or their counsel made any monetary contributions to its preparation or submission. Both Petitioner and Respondent consented to this filing; their letters of consent are being submitted with the brief.

("SO_2") (a precursor to fine particle pollution),[2] OCE has joined NPCA as a plaintiff in the Clean Air Act citizen suit in Tennessee. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (currently pending).

SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this case did precisely what the Clean Air Act's enforcement scheme was designed to prevent: allow a facial challenge to a regulation in the context of an enforcement action. 42 U.S.C. § 7607(b)(2). This brief in support of the petitioner focuses on the plain language of the applicable regulations and shows how the Fourth Circuit's decision is contrary to that language. In summary, the Fourth Circuit failed to analyze the regulatory text at all, but instead based its holding on a theory that the regulations are inconsistent with the statute. Such an invalidation of the regulations is proper only in the D.C. Circuit, and that circuit has upheld these same regulations. Allowing this type of collateral attack on a validly promulgated regulation would undermine the enforcement scheme created by Congress for the Clean Air Act and many other environmental statutes. Furthermore, given current serious air pollution problems in National Parks caused by coal-fired power plants, and the number of those plants that have allegedly violated the regulations at issue here, the Fourth Circuit's error will have widespread adverse consequences.

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[2] *See* (Proposed) Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4572 (Jan. 30, 2004)("Mass associated with ammonium sulfate concentrations make up a significant portion (25 to 50 percent) of the annual average $PM_{2.5}$ mass. The largest sulfate contributions to $PM_{2.5}$ mass occur during the summer season mainly within a large multi-State area centered near Tennessee and Southwest Virginia.").

ARGUMENT

A. THE UNDERLYING ISSUE IN THE CASE

Under the Clean Air Act's Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-79, if an owner of a major stationary source makes a "major modification," then it becomes subject to emission limits known as "Best Available Control Technology" ("BACT"). 40 C.F.R §§ 51.166 § (i) and (j). In this case, the plaintiffs alleged that Duke Energy undertook 29 projects at eight coal-fired power plants between 1988 and 2000, and each of these projects met the definition of "major modification." Pet. App. 25a-26a. Because these projects were "major modifications," Duke Energy should have obtained stringent BACT emission limits for them, but it never did. The plaintiffs seek an order requiring Duke Energy to obtain the emission limits and operate under them, potentially leading to reductions in hundreds of thousands of tons in sulfur dioxide and nitrogen oxide emissions.

In order to have a "major modification" for the purposes of the PSD program, there must be: (1) a physical change in or change in the method of operation at a major stationary source that would (2) result in a significant net emissions increase. 40 C.F.R. § 51.166(b)(2). The Fourth Circuit's opinion focused on this second element. The plaintiffs contended that in order to have a modification, there must be an increase in ***annual*** actual emissions. Pet. App. 6a-7a. The defendant utility contended that there must be an increase in the ***hourly*** rate of emissions. Pet. App. 6a-7a. Which test applies has practical real world consequences.

The measure of a power plant's ability to generate power in a particular hour is known as its "capacity." Pet. App. 67a. A power plant, as it ages, may be able to maintain its maximum capacity when it is operating, but it may not be available to

generate power around the clock, particularly because malfunctions, or forced outages, cause unplanned shutdowns. *United States v. Ohio Edison Company*, 276 F. Supp. 2d 829, 838 (S.D. Ohio 2003). Accordingly, a power company can undertake massive overhauls that eliminate forced outages, significantly improving a plant's availability, on an ***annual*** basis, yet leave its "capacity" to generate power in any particular ***hour*** when it is operating, unchanged. In this case, Duke Energy argued that its projects did not trigger the PSD regulations because the projects did not increase the facilities' hourly capacity. Pet. App. 7a. Thus, if the applicable regulations are interpreted to require an increase in ***annual*** actual emissions, the projects, assuming they are found to be non-routine, triggered the PSD regulations. On the other hand, if the regulations are interpreted to require an increase in the ***hourly*** rate of emissions, the projects did not trigger the PSD regulations.

B. THE FOURTH CIRCUIT'S INTERPRETATION CANNOT BE SUPPORTED BY THE LANGUAGE OF THE REGULATIONS

In this case, the Fourth Circuit, under the guise of "interpreting" the applicable regulations, held that in order to have a "major modification," a project must lead to an increase in the hourly rate of emissions, not just an increase in annual actual emissions. Pet. App. 6a-7a. However, the language of the applicable regulations cannot support the Fourth Circuit's interpretation. Accordingly, the only way the Fourth Circuit could have achieved its holding was by invalidating the regulation, something it had no jurisdiction to do. 42 U.S.C. 7607(b)(2). This brief closely examines the applicable regulations to show that they cannot support the Fourth Circuit's result.